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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/814,926	03/31/2004	Andy Schwammberger	ZIM0591	7919
832 7590 03/25/2009 BAKER & DANIELS LLP 111 E. WAYNE STREET SUITE 800 FORT WAYNE, IN 46802				
EXAMINER SHAFFER, RICHARD R				
ART UNIT		PAPER NUMBER		
3775				
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/814,926

Applicant(s)

SCHWAMMBERGER ET AL.

Examiner

Richard Shaffer

Art Unit

3775

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 01 December 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 35-38, 40-42, 44-50, 52-54, 56-62 and 67-71 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 35-38, 40-42, 44-50, 52-54, 56-62 and 67-71 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-849)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 35-38, 40-42, 44-50, 52-54, 56, 57, 59, 60 and 69-71 are rejected under 35 U.S.C. 102(b) as being anticipated by Dall et al (US Patent 5,665,089).

Dall et al disclose (**Figure 8**) a system comprising: a main plate (**81**) with passages (**48**) extending parallel to the plane defined by the main plate; prefabricated elongate flexible connection elements/wire/thread (**64**) pass through the passages (**48**); each connection element is different with respect to shape, size or length (impossible to have perfectly uniform thickness, plus the length will be cut according to different orientations and encircling different anatomies); a flexible (relative term) outrigger (**82**) perforated with a plurality of holes/ring sections adapted to receive at least five (**Column 5, Lines 1-2**) bone screws (**80**); the holes are in a grid-like shape; the outrigger (**82**) has a base area smaller (the thickness along the bone is shorter) than that of the main plate; the device is intended to have the free ends of U-shaped (when bent around) wires (**64**) fixed remote (**See Figure 8**) from the outrigger (**82**) and is inherently capable of being twisted or tied instead of crimped; the outrigger and main plate are offset from one another and can have the distance between them controlled by the connection elements (**64**); the main plate has a hook-like element (the base portion

is concave and thus both side edges can be "hooks"); and the outrigger and connection elements when fixed together are un-releasably connected.

In regard to the newly added limitations of: U-shape flexible connection element having a pair of U limbs extending outwardly from a U base of the outrigger element to be received within a pair of passages within the main plate, it is noted that the flexible element (64) meets the claim when being fed in such a way to have two free ends extending from the outrigger (82), with each free end received within one of the pair of passages (48) within the main plate (81).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 58, 61, 62, 67 and 68 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dall et al in view of Tassin (WO 03/032849).

Dall et al disclose all of the claimed limitations except for the outrigger and connection element being formed integrally, the "thickness" of the outrigger less than half the "thickness" of the main plate, and the outrigger made of a bioabsorbable material plastically deformable at temperatures between 50 and 90 degrees Celsius.

Tassin teaches (abstract) the use of integrating/forming in one piece/monolithically creating an element for fixation to bone with the connector element to connect to adjacent bone fixators in order to minimize assembly time. It would have

been obvious to one having ordinary skill in the art at the time the invention was made to form the outrigger and connection element as one piece in order to reduce assembly time. The court has additionally held "that the use of a one piece construction instead of the structure disclosed in the prior art would be merely a matter of obvious engineering choice." See *In re Larson*, 340 F.2d 965, 968, 144 USPQ 347, 349 (CCPA 1965). This limitation would broadly read upon the limitation of the thickness of the outrigger being less than half the thickness of the main plate.

However, in order to maintain a consistent interpretation, it would have further been an obvious matter of design choice to one having ordinary skill in the art at the time the invention was made to have an outrigger with less than five fastening holes and thus have a "thickness" less than half of the main plate since such a modification would have involved a mere change in the size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art. *In re Rose*, 105 USPQ 237 (CCPA 1955).

In addition, it would have been obvious to one having ordinary skill in the art at the time the invention was made to select a bioabsorbable material which is plastically deformable between the temperatures of 50 and 90 degrees Celsius since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416.

Response to Arguments

Applicant's arguments filed on December 1st, 2008 have been fully considered but they are not persuasive. In regard to applicant's arguments regarding the 35 U.S.C. 102(b) rejection as being anticipated over Dall et al, the lower plate as shown in Figure 8 already has both free ends of the flexible connection element extending to the top plate. Therefore the "U-shape" is already located within the lower plate with the two limbs extending to the main plate. The flexible element therefore has already been disclosed as being U-shaped meeting functional as well as structural limitations set forth.

In regard to claims 69-71 now being rejected under 35 U.S.C. 102(b) as being anticipated by Dall et al, the usage of "integral" in the broadest reasonable interpretation can include necessary components. Therefore the outrigger element is a "necessary" component which includes a flexible connection element having a pair of arms.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the

shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Richard Shaffer whose telephone number is (571)272-8683. The examiner can normally be reached on Monday-Friday (7am-5pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on 571-272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Richard Shaffer/
Examiner, Art Unit 3775
/Eduardo C. Robert/
Supervisory Patent Examiner, Art Unit 3733